

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT EARL RICE,

Defendant-Appellant.

UNPUBLISHED

April 16, 2002

No. 229651

Wayne Circuit Court

LC No. 99-009487-02

Before: Zahra, P.J., and Neff and Saad, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of one count of carjacking, MCL 750.529a, and two counts of armed robbery, MCL 750.529. The trial court sentenced defendant to concurrent sentences of nine to twenty years' imprisonment for the convictions. We affirm.

Defendant contends that the trial court erred because it instructed the jury not to choose a foreperson. Although CJI2d 3.11 states that the trial court should instruct the jury to choose a foreperson, Michigan courts are not required to adhere to the instructions of CJI2d. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). We therefore find that the trial court committed no error in instructing the jury to serve as facilitators.

Defendant also says that prosecutorial misconduct prevented him from receiving a fair trial. We disagree.

Prosecutorial misconduct is reviewed case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Where the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction, no error requiring reversal will be found. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997).

Because defendant did not object at trial, his claim is reviewed for plain error. *Schutte*, *supra*, 240 Mich App at 720. Under this standard, "1) error must have occurred; 2) the error was plain, i.e., clear or obvious; 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The third factor requires a showing that the error was outcome determinative. *Id.* Accordingly, reversal is only proper if an actually innocent

person was convicted or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* Finally, reversal is not merited if the error could have been cured by a timely instruction from the court. *People v Humphreys*, 24 Mich App 411, 416; 180 NW2d 328 (1970).

The prosecution did not allege that the entire defense was a fabrication or that defense counsel was intentionally lying or trying to mislead the jury. *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). The comments here are similar to those we found acceptable in *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996), where the prosecution stated that the defense counsel was trying to “confuse the issue.” Nor do we find that the prosecution engaged in an improper civic duty argument. *Id.* Therefore, defendant was not denied a fair and impartial trial. *Howard, supra* at 544.

Further, defendant claims that the trial court’s comments to the jury indicated that its instructions were suggestions rather than binding rules of law. We disagree. Although the trial court deviated from CJ12d 3.1 ¶ 4, this in itself does not constitute error. *Petrella, supra* at 277. We find that the trial court’s instructions “fairly presented the issues to be tried and sufficiently protected defendant’s rights.” *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999).

Defendant also asserts that he received ineffective assistance of counsel because his trial attorney failed to object to the alleged errors. We found none of the instances alleged by defendant to constitute error; therefore, we find no merit in this issue because ineffective assistance cannot be based on the failure to make futile objections. *People v Chinn*, 141 Mich App 92, 98; 366 NW2d 83 (1985). Similarly, defendant’s contention that the cumulative effect of the alleged errors denied him a fair trial, is without merit. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 244 (2001).

Finally, defendant alleges that the use of a photographic lineup to identify him while he was in custody and without the presence of counsel, constituted error. We review this claim de novo. *People v Brown*, 239 Mich App 735, 750; 610 NW2d 234 (2000). Defendants have a general right to the presence of counsel at a photographic lineup. *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973). However where, as here, there is substantial, reliable testimony which identifies defendant and clearly constitutes an independent basis for identification, then the photographic lineup is clearly not outcome determinative and reversal is not warranted. *People v McCray*, 245 Mich App 631, 639-641; 630 NW2d 633 (2001); *People v Ealey*, 102 Mich App 301, 307; 301 NW2d 514 (1980).

Our courts look at the following factors to ensure that there is an independent basis for identification:

1. Prior relationship with or knowledge of the defendant.
2. The opportunity to observe the offense. This includes such factors as length of time of the observation, lighting, noise or other factor affecting sensory perception and proximity to the alleged criminal act.
3. Length of time between the offense and the disputed identification. . . .

4. Accuracy or discrepancies in the pre-lineup or show-up description and defendant's actual description.
5. Any previous proper identification or failure to identify the defendant.
6. Any identification prior to lineup or show up of another person as defendant.
7. . . . the nature of the alleged offense and the physical and psychological state of the victim.
8. Any idiosyncratic or special features of defendant. [*People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977) (internal citations omitted).]

Here, these factors were sufficiently present to establish an independent basis for defendant's in-court identification. Also, nothing in the record indicates that the photographic lineup was unduly suggestive, that it led to a substantial likelihood of irreparable misidentification, or that the photographic identification was outcome determinative.

Affirmed.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Henry William Saad